



U.S. Department of Justice

Environment and Natural Resources Division

BSG:AML
DJ No. 90-11-3-1620/2

Environmental Enforcement Section
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November 13, 2001

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VIA FEDERAL EXPRESS

Clerk's Office
United States District Court for the Southern District of Ohio
Rm. 324
Potter Stewart Courthouse
100 E. 5th St.
Cincinnati, OH 45202

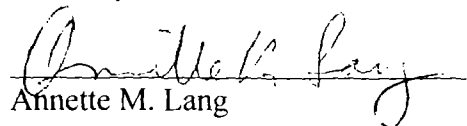
Re: Dow Chemical, et al. v. Acme Wrecking et al.
Dow Chemical, et al. v. Sun Oil Co., et al.
United States v. Aeronca, Inc. et al.
Consolidated Civil Action Nos. C-1-97-0307; C-1-97-0308; C-1-01-439

Dear Clerk:

Enclosed for filing please find the original and two copies of (1) an Unopposed Motion of the United States for Leave to File Second Amended Complaint (with the proposed Second Amended Complaint and proposed Order attached thereto); and (2) a Notice of Lodging of Consent Decree. If you could please return one filed-stamped copy of each document in the enclosed, self-addressed, stamped envelope, I would appreciate it.

Thank you for your prompt attention to this matter.

Sincerely,


Annette M. Lang
Trial Attorney

cc: All Counsel on the Service List
Craig Melodia
Gerald Kaminski

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

THE DOW CHEMICAL CO., <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action Nos.
)	C-1-97-0307; C-1-97-0308
ACME WRECKING CO., INC., <u>et al.</u> ,)	(Consolidated Actions)
)	
Defendants.)	C-1-01-439
)	(Transferred Action)
)	
THE DOW CHEMICAL CO., <u>et al.</u>)	Judge Weber
)	
Plaintiffs,)	
)	
v.)	
)	
SUN OIL COMPANY, d/b/a SUNOCO)	
OIL CORP., <u>et al.</u> ,)	
)	
Defendants.)	
)	
)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	
AERONCA, INC., <u>et al.</u>)	
)	
Defendants.)	
)	

**UNOPPOSED MOTION OF THE UNITED STATES
FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

Plaintiff, the United States of America ("United States") hereby files this Unopposed Motion for Leave to File a Second Amended Complaint. The proposed Second Amended Complaint is attached hereto. As grounds therefore, the United States states:

1. On June 29, 2001, the United States filed the original complaint in Case Number C-1-01-439, against four defendants. Because of the inter-relationships between two of the four entities (the "Marty Clarke entities"), the United States, in effect, sued three entities: the Marty Clarke entities, Aeronca, and Whitton Container.

2. On August 31, 2001, the United States filed an Amended Complaint naming an additional three defendants. Because all three of these defendants were related to each other (the "Dick Clarke entities"), the United States, in effect, added only one additional entity. This Amended Complaint was filed as of right because it was filed prior to the due date of a responsive pleading to the original complaint.

3. All four entities that the United States sued served answers to the original and/or Amended Complaint.

4. The Second Amended Complaint attached hereto seeks to add four additional defendants: Acme Wrecking Co., Inc., the David Hirschberg Co., Sealy, Inc., and Sealy Mattress Company.

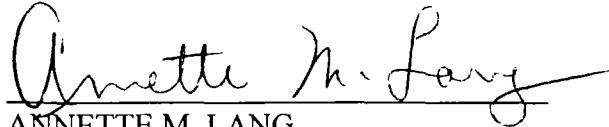
5. By even date herewith, the United States is lodging a Consent Decree that completely resolves the United States' claims against the four defendants to be added by means of the attached Second Amended Complaint. Moreover, the claims of the plaintiffs in the private contribution actions numbered C-1-97-0307 and C-1-97-0308 against these four defendants also will be resolved upon entry of the Consent Decree that is lodged by even date herewith. Thus, no litigation against these four, newly-added defendants is anticipated.

6. The four, newly-added defendants and the four previous defendants -- Aeronca, the Marty Clarke entities, the Dick Clarke entities, and Whitton -- do not oppose the filing of this Second Amended Complaint.

WHEREFORE, the United States respectfully requests this Court to enter the attached
Order granting leave to file a Second Amended Complaint.

Respectfully submitted,

W. Benjamin Fisherow
Deputy Section Chief
Environmental Enforcement Section
Environment & Natural Resources Div.
U.S. Department of Justice



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Plaintiffs,)	
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SUN OIL COMPANY, d/b/a SUNOCO)	
OIL CORP., <u>et al.</u> ,)	
)	
Defendants.)	
<hr/>)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	
AERONCA, INC. (f/k/a Aeronca)	
Manufacturing Corp. f/k/a/ Aeronca)	
Aircraft),)	
CLARKE CONTAINER, INC.,)	
CLARKE'S INCINERATORS, INC.,)	
WHITTON CONTAINER, INC. (f/k/a)	
John J. Whitton Trucking, Inc.),)	
CLARKE, INC., CLARKE SERVICES,)	
INC., RICHARD M. CLARKE,)	
ACME WRECKING COMPANY, INC.,)	

DAVID HIRSCHBERG CO.,)
SEALY, INC., SEALY MATTRESS)
COMPANY,)
)
Defendants.)
_____)

SECOND AMENDED COMPLAINT

The United States of America, by the authority of the Attorney General and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("U.S. EPA"), files this second amended complaint and alleges as follows:

NATURE OF THE ACTION

1. This is a civil action pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607(a), for recovery of response costs incurred by the United States in responding to releases or threatened releases of hazardous substances at or from the Skinner Landfill Superfund Site in West Chester, Ohio (the "Site"). Pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), the United States also seeks declaratory relief that Defendants are jointly and severally liable for all future response costs that the United States may incur as a result of the release or threatened release of hazardous substances at or from the Site.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to Sections 107(a) and 113(b) of CERCLA, 42 U.S.C. § 9607(a) and 9613(b), and 28 U.S.C. §§ 1331 and 1345.

3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) and Section 107(a) and 113(b) of CERCLA, 42 U.S.C. §§ 9607(a) and 9613(b), because the claims arose and the releases or threatened releases of hazardous substances that give rise to the claims occurred in this district.

DEFENDANTS

4. Aeronca, Inc. is or at relevant times was a corporation organized under the laws of the State of Ohio and authorized to do business in Ohio. Aeronca, Inc. was formerly known as Aeronca Manufacturing Corp. which was formerly known as Aeronca Aircraft.

5. Clarke Container, Inc. is or at relevant times was a corporation organized under the laws of the State of Ohio and authorized to do business in Ohio.

6. Clarke's Incinerators, Inc. is or at relevant times was a corporation organized under the laws of the State of Ohio and authorized to do business in Ohio.

7. Whitton Container, Inc. is or at relevant times was a corporation organized under the laws of the State of Ohio and authorized to do business in Ohio. Whitton Container, Inc. was formerly known as John J. Whitton Trucking, Inc.

8. Clarke Services, Inc. is or at relevant times was a corporation organized under the laws of the State of Ohio and authorized to do business in Ohio.

9. Clarke, Inc. is or at relevant times was a corporation organized under the laws of the State of Ohio and authorized to do business in Ohio.

10. Richard M. Clarke is a natural person, and upon information and belief, is a resident of the State of Ohio. At relevant times, Richard M. Clarke was the sole shareholder of Clarke Services, Inc., and was the shareholder distributee of proceeds from a 1984 sale of the

assets of Clarke Services, Inc. to Browning-Ferris Industries of Ohio, Inc. At relevant times, Richard M. Clarke did business as "Dick Clarke Co.," an unincorporated, sole proprietorship.

11. Acme Wrecking Company, Inc. is or at relevant times was a corporation organized under the laws of Ohio and authorized to do business in Ohio.

12. The David Hirschberg Company is or at relevant times was a corporation organized under the laws of Ohio and authorized to do business in Ohio.

13. Sealy, Inc. is or at relevant times was a corporation organized under the laws of the State of Ohio and authorized to do business in Ohio.

14. Sealy Mattress Company is or at relevant times was a corporation organized under the laws of the State of Ohio and authorized to do business in Ohio. Sealy Mattress Company was formerly known as Ohio-Sealy Mattress Manufacturing Co.

15. Each of the above-captioned Defendants is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

16. Defendants Aeronca, Inc., Clarke Container, Inc., Clarke's Incinerators, Inc., Clarke, Inc., Clarke Services, Inc., Richard M. Clarke, Acme Wrecking Company, Inc., and the David Hirschberg Co. are persons who by contract, agreement or otherwise, arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned by each such Defendant at the Site, as described in Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), or accepted hazardous substances for transport to disposal or treatment at the Site, and selected the Site for disposal or treatment, as described in Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4).

17. In July of 1990, a sole proprietorship that did business as Dick Clarke Co. was incorporated as Clarke, Inc. Clarke, Inc. was a mere continuation of the ongoing business of Dick Clarke Co. Clarke, Inc. succeeded to the liabilities of Dick Clarke Co.

18. In December of 1993, a sole proprietorship owned and operated by John J. Whitton, and doing business as John J. Whitton Trucking Co., was incorporated as John J. Whitton Trucking, Inc. John J. Whitton Trucking Co. was a person who by contract, agreement or otherwise, arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned by each such Defendant at the Site, as described in Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), or accepted hazardous substances for transport to disposal or treatment at the Site, and selected the Site for disposal or treatment, as described in Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4). John J. Whitton Trucking, Inc. was a mere continuation of the ongoing business of John J. Whitton Trucking Co. John J. Whitton Trucking, Inc. succeeded to the liabilities of John J. Whitton Trucking, Co. In the late 1990's, John J. Whitton Trucking, Inc. changed its name to Whitton Container, Inc.

19. At relevant times, The Stearns & Foster Company, The Stearns & Foster Bedding Company, Stearns & Foster Technical Textile Company (collectively "Sealy Predecessor Companies"), and Ohio-Sealy Mattress Manufacturing Company were persons who by contract, agreement or otherwise, arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned by each such Defendant at the Site, as described in Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), or accepted hazardous substances for transport to disposal or treatment at the Site, and selected the Site for

disposal or treatment, as described in Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4).

Sealy, Inc. succeeded to the liabilities of the Sealy Predecessor Companies. Ohio-Sealy Mattress Manufacturing Company is now known as Sealy Mattress Company.

THE SKINNER LANDFILL SUPERFUND SITE

20. The Site is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

21. "Hazardous substances" within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), including but not limited to paint wastes, ink wastes, creosote, pesticides and other chemical wastes, and construction debris containing hazardous substances have been dumped, poured, emitted, discharged or otherwise disposed of onto land surface or subsurface strata at the Site. Elevated levels of hazardous substances, including 1,1-dichloroethane, 1,2-dichloroethane, 1,2-dichloroethene, 1,2-dichloropropane, chloroethane, ethylbenzene, chloroform, trichloroethene 1,3-dichlorobenzene, 1,4-dichlorobenzene, naphthalene, and vinyl chloride have been detected in groundwater at the Site.

22. There have been "releases" or threatened releases of "hazardous substances" into the "environment" at the Site within the meaning of Sections 101(22), 101(14) and 101(8) of CERCLA, 42 U.S.C. § 9601(22) and (14).

23. As a result of the release or threatened releases of hazardous substances into the environment at the Site, the United States has incurred response costs, and may incur future response costs including investigative, administrative, and legal costs.

CLAIM FOR RELIEF

24. The allegations contained in paragraphs 1 - 23 are realleged and incorporated herein by reference.

25. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides, in pertinent part:

- (a) Notwithstanding any other provision or rule of law and subject only to the defenses set forth in subsection (b) of this section –
 - (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
 - (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
 - (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan. . . .

26. Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), provides, in part:

In any such action . . . [for recovery of the costs referred to in section 9607 of this title or for natural resource damages], the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages.

27. As a result of releases or threatened releases of hazardous substances at the Site, the United States has incurred "response costs," as defined in Section 101(25) of CERCLA, 42 U.S.C. § 9601(25). As of May 31, 2000, the United States has incurred response costs of at least

\$4.3 million in responding to the release or threatened release of hazardous substances at or from the Site.

28. The response costs incurred by the United States at the Site were not inconsistent with the National Contingency Plan, 40 C.F.R. Part 300.

29. Aeronca, Inc., David Hirschberg Co., Sealy, Inc. and Sealy Mattress Company are members, or successors to members, of the class of liable parties described in Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3). The remaining defendants (the "transporter defendants") are members, or successors to members, of the class of liable parties described in Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4). Each of the transporter defendants selected the Site for disposal or treatment, as described in Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4).

30. Each Defendant is jointly and severally liable to the United States pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for of the response costs incurred by the United States in connection with the Site, including enforcement costs.

31. Each Defendant is liable to the United States pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for prejudgment interest on those response costs for which a demand for payment was made.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff United States of America prays that this Court:

1. Enter judgment in favor of the United States and against all the Defendants, jointly and severally, for the response costs incurred by the United States, including prejudgment interest, for response actions related to the Site;

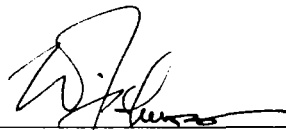
2. Enter a declaratory judgment that the Defendants are jointly and severally liable for all future response costs to be incurred by the United States for response actions related to the Site;

3. Award the United States its costs in this action; and

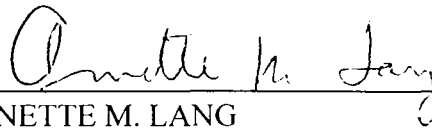
4. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment and Natural Resources
Division
United States Department of Justice

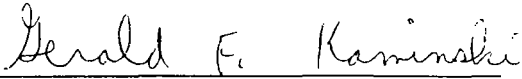


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Deputy Section Chief
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v.)	
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AERONCA, INC., <u>et al.</u>)	
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Defendants.)	
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This Court, having duly considered the Unopposed Motion of the United States for Leave to File a Second Amended Complaint, hereby finds good cause and ORDERS and ADJUDGES:

1. The Unopposed Motion of the United States for Leave to File a Second Amended Complaint hereby is GRANTED;

2. The Clerk of the Court hereby is directed to file the Second Amended Complaint of the United States.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November 2001, I caused a true copy of the foregoing **UNOPPOSED MOTION OF THE UNITED STATES FOR LEAVE TO FILE SECOND AMENDED COMPLAINT** to be served by first-class mail, postage prepaid upon the following counsel of record:

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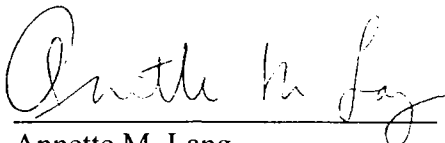
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